

UNPUBLISHED
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

BOBBY BOWERS,

Petitioner,

vs.

KEN BURGER, Warden,

Respondent.

No. C02-2037-MWB

REPORT AND RECOMMENDATION
ON MOTION TO DISMISS

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I. INTRODUCTION

This matter is before the court on the Motion to Dismiss (Doc. No. 21) filed by the respondent Ken Burger ("Burger") on December 31, 2002. The petitioner Bobby Bowers ("Bowers") commenced this action on or about May 30, 2002, by filing a petition for writ

of *habeas corpus* in the United States District Court for the Southern District of Iowa. The case was transferred to the Northern District of Iowa on June 3, 2002. In Bowers's original petition, he listed the State of Iowa as respondent. In response to the court's Initial Review Order, Bowers filed an amended and substituted petition on November 12, 2002 (Doc. No. 18), correctly naming Burger as the respondent.

On December 31, 2002, Burger filed an answer to the petition (Doc. No. 20), and a motion to dismiss the amended petition with a supporting brief. (Doc. Nos. 21 & 22) Bowers, through his appointed counsel, filed a resistance and supporting brief on May 12, 2003. (Doc. Nos. 30 & 31) Burger filed a reply brief on May 19, 2003. (Doc. No. 32)

On January 2, 2003, Chief Judge Mark W. Bennett referred this matter to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition. The court finds Burger's motion has been fully submitted, and turns to consideration of the motion.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY IN STATE COURTS OF IOWA

On July 17, 1995, Bowers was charged by a Trial Information filed in the District Court of Black Hawk County, Iowa, with two counts of second degree sexual abuse. On September 1, 1995, his attorney, Assistant Public Defender Joe R. Sevcik, filed an application for a mental evaluation and determination of competency, alleging Bowers "may lack the capacity and competency to stand trial," and "has had prior psychiatric and mental hospitalizations." The court granted the motion, and Bowers was ordered transported to the Mental Health Institute in Independence, Iowa, for "inpatient psychiatric and psychological evaluation and treatment to determine [his] competency to stand trial and aid in his defense."

On September 29, 1995, staff physician R. Patel, M.D. and staff psychiatrist A. Rahim, M.D. issued a report to the Black Hawk County district judge. In the report, the doctors stated they had evaluated Bowers utilizing frequent psychiatric interviews, psychiatric examination lab tests, psychological testing, psychological interviews, and information gathered from other sources. They also stated they had conducted a physical examination, which was essentially normal.¹

The doctors determined Bowers “understands that there are some charges pending against him and he understands the duties of the prosecuting attorney and how his defense attorney will help him.” They also concluded he “knows right from wrong,” and “he is not overtly depressed or overtly psychotic.” They included in their report the opinion of a psychologist who interviewed Bowers and found Bowers “should be able to help his attorney to defend him,” and “is competent to stand trial.” His doctors concluded with the following diagnosis: “Adjustment disorder NOS in remission; Cannabis Abuse by history; Alcohol abuse by history; Learning disability in reading by history; Antisocial personality traits; past history of right hand repair.”

On October 27, 1995, Bowers pled guilty to both charges, and on the same day, he was sentenced to two 25-year concurrent sentences. He did not file a motion in arrest of judgment pursuant to Iowa Rule of Criminal Procedure 2.24(3),² and he did not file a direct appeal.

¹Bowers’s EEG was slightly abnormal, with “slight intermittent diffuse abnormalities.” Bowers was referred to the neurology department at University Hospitals in Iowa City, Iowa, where a “Dr. Cooper” determined (1) there were no significant abnormalities in the EEG, (2) Bowers did not need any treatment for neurological problems, and (3) the abnormal EEG would not interfere with his ability to help himself in his defense or to understand the charges against him.

²In fact, Bowers had no opportunity to file a motion in arrest of judgment because, under Rule 2.24(3)(b), the motion must be filed at least five days before sentencing, and Bowers was sentenced immediately after pleading guilty to the charges.

On January 8, 1998, Bowers filed a petition for writ of *habeas corpus* in the United States District Court for the Southern District of Iowa. The case was transferred to the Northern District of Iowa on January 13, 1998. On March 24 1998, Judge Bennett dismissed the petition without prejudice because Bowers had failed to properly exhaust his state court remedies.

On April 6, 1998, Bowers filed an application for post-conviction relief (“PCR”) in state court. On August 3, 1998, the state PCR action was dismissed without prejudice because Bowers had failed to pay the proper filing fee or show *in forma pauperis* status. No appeal was taken from the dismissal, and no subsequent state PCR was filed.

In the present action, Bowers has listed the following grounds and factual allegations in support of his application:

He “lacked the requisite mental capacity to enter a knowing, voluntary, and intelligent plea of guilty to the charges.

His “lack of mental capacity [prevented him from making a] knowing, voluntary or intelligent waiver of his right to file a Motion in arrest of Judgment and additional time for sentencing.”

“The elements of the offence of sexual abuse were not sufficiently explained to [him] by the Black Hawk County District Court such that can be construed as entering a factual basis for the plea.”

He “lacked requisite mental capacity to knowingly and intelligently waive his Miranda rights.”

He “was not charged under his true and correct name, and [] another person is responsible for the crime for which he is currently incarcerated.”

(Doc. No 18, ¶ 10)

III. THE PARTIES' POSITIONS REGARDING DISMISSAL

Burger argues this action is time barred by the statute of limitations contained in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").³ He also argues the claims raised by Bowers in his petition for writ of *habeas corpus* are procedurally defaulted because Bowers has failed to exhaust his state court remedies. (See Doc. No. 22)

Bowers argues his mental deficiencies excuse his failure to file a timely petition in this court. He also argues that competency claims, such as those he is asserting in this action, are not subject to procedural default, and in the alternative, his mental deficiencies constitute cause and prejudice to excuse any procedural default. (See Doc. No. 31)

The court turns now to consideration of the issues raised by the parties.

IV. DISCUSSION

A. Statute of Limitations

The State argues Bowers's petition is barred by the statute of limitations contained in the AEDPA. The AEDPA provides that "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). The one-year limitation period runs from the last of four events: the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action; the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or the date on which the factual

³The AEDPA is codified, in pertinent part, at 28 U.S.C. § 2244.

predicate of the claim or claims presented could have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1)(A)-(D).

The only one of these circumstances applicable to the present case is “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” This occurred on October 27, 1995, the date on which Bowers was sentenced. Thus, Bowers’s judgement became final on October 27, 1995, and this is the date on which the AEDPA one-year statute of limitations began to run. Bowers initiated the pending action on May 30, 2002, over six years after the expiration of the one-year statute of limitations. Because none of Bowers’s post-conviction filings in state or federal court were “properly filed,” they did not toll any part of this period. See 28 U.S.C. § 2244(d)(2); *Beery v. Ault*, 312 F.3d 948, 950-51 (8th Cir. 2002).⁴ Accordingly, Bowers’s present *habeas* action is barred by the AEDPA’s statute of limitations, and the State’s motion to dismiss should be granted.

In her brief (Doc. No. 31), Bowers’s counsel combines her arguments on the statute of limitations with her arguments on procedural default, so it is difficult for the court to determine the reasons being advanced to support an argument that the statute of limitations should not apply in this case. In general, Bowers’s counsel is arguing that none of the procedural requirements of the AEDPA should apply to Bowers because he suffers from “a permanent state of mental retardation.” (*Id.*, p. 9)

⁴The running of the statute of limitations would have been tolled while any appeal was “pending,” but Bowers had no right to appeal from his guilty plea after he was sentenced because he did not file a motion in arrest of judgment under Iowa R. Crim. P. 2.24(3)(a) (“A defendant’s failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude the defendant’s right to assert such challenge on appeal.”). Therefore, any appeal under state law would not have been “properly filed.” See *Carey v. Saffold*, 536 U.S. 214, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002).

Even if the time during which Bowers’s attempts at post-conviction relief is excluded from the calculation, the current action is still untimely by a large margin.

To provide factual support for this argument, Bowers's counsel attaches to her brief two exhibits: a psychological progress note from the Iowa Medical and Classification Center (Exhibit A), and a psychological report from the Center (Exhibit B). In the progress note (Ex. A), which is dated November 3, 1995, a licensed psychologist stated Bowers "appeared to be rather intellectually low functioning, but only psychological testing can tell for sure." However, the psychologist also stated the following: Bowers "followed the conversation in a logical and coherent manner," his "[t]hought was relevant and goal oriented," "[t]here are no signs of any severe form of psychopathology such as hallucinations or delusions," and "[h]e has no history of psychiatric problems nor does he appear to have any major psychiatric problems at this time other than possible low intellectual functioning." The psychological report (Ex. B), which is dated December 27, 1995, was prepared by another licensed psychologist. Bowers's IQ was determined to be 70. The psychologist concluded, "Bowers is a rather naive, insightful young man with some social limitations and some apparent intellectual limitations."

Relying on these exhibits, Bowers's counsel argues Bowers was incompetent, and his incompetence somehow precludes the application of the statute of limitations. This argument is not supported either by the facts or the law. The facts cited by Bowers's counsel fall far short of what would be required to demonstrate that Bowers was not competent to pursue a timely direct appeal or state PCR action. At most, they show he was intellectually low functioning, a fact that was known to the judge who took Bowers's plea and sentenced him. Low intelligence cannot be equated with mental incompetence. *Medina v. Singletary*, 59 F.3d 1095, 1107 (11th Cir. 1995). Furthermore, the same doctors who determined that Bowers was intellectually low functioning also determined he was competent to assist his attorney and stand trial.

Even if the evidence were stronger, there simply is no legal authority to support an argument that Bowers should be able to present his competence argument in an untimely

application filed in federal court without first presenting this argument to the state court. Bowers has failed to present a tenable argument to toll the AEDPA's statute of limitations. Because he filed this action outside that statute of limitations, Burger's motion to dismiss should be granted.

B. Procedural Default

The second prong of Burger's motion to dismiss is his argument that Bowers's claims are procedurally defaulted due to his failure to file a motion in arrest of judgment, to appeal, or to pursue an appropriate PCR action. To avoid procedural default for failing to pursue these state court remedies, Bowers would have to show cause for that failure, and resulting prejudice. *Engle v. Isaac*, 456 U.S. 107, 129, 102 S. Ct. 1558, 1572, 71 L. Ed. 2d 783 (1982) (“[A]ny prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief.”); accord *Maynard v. Lockhart*, 981 F.2d 981, 984 (8th Cir. 1992) (“A state procedural default bars federal habeas review unless the petitioner ‘can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law.’” *Coleman v. Thompson*, [501] U.S. [722, 750], 111 S. Ct. 2546, 2565, 115 L. Ed. 2d 640 (1991).”) “In the absence of a finding of cause and prejudice, a federal court is precluded from reviewing procedurally defaulted claims on its own motion.” *Maynard*, 981 F.2d at 985 (citing *Stewart v. Dugger*, 877 F.2d 851, 854-55 (11th Cir. 1989) (subsequent history omitted)). Bowers once again advances his alleged mental incompetence as cause for his procedural default.

In *Vogt v. United States*, 88 F.3d 587, 590 (8th Cir. 1996), the Eighth Circuit Court of Appeals noted, “Due process prohibits the trial and conviction of a defendant who is mentally incompetent.” The court further held, “[T]he procedural default rule . . . does not operate to preclude a defendant who failed to request a competency hearing at trial or

pursue a claim of incompetency on direct appeal from contesting his competency to stand trial and be sentenced through post-conviction proceedings.” *Id.*, 88 F.3d at 590. “Absent some contrary indication, trial judges may presume that defendants are competent, *Branscomb v. Norris*, 47 F.3d 258, 261 (8th Cir. 1995), thus the burden of persuasion rests with [the petitioner] to show that he was incompetent to stand trial by a preponderance of the evidence. *Vogt*, 88 F.3d at 591 (citations omitted).” *United States v. Jimenez-Villasenor*, 270 F.3d 554, 559 (8th Cir. 2001). A petitioner must present evidence that his mental condition affected him to such an extent that it prevented him from being able to consult with his lawyer or from having a rational understanding of the proceedings against him. *Vogt*, 88 F.3d at 590-91.

Bowers has not presented the court with any evidence to show his intellectual deficiencies prevented him from competently entering a plea of guilty, or from understanding that he was required to present his post-conviction issues to the state court before filing his federal action. In fact, after his first federal *habeas* application was dismissed on March 24, 1998, because of his failure to exhaust state court remedies, he promptly filed a state PCR action on April 6 1998, but allowed it to be dismissed for failure to pay the filing fee. Thereafter, he failed to commence the present action until May 30, 2002, some four years later.

Because Bowers has failed to show sufficient cause for the procedural default of his claims, Burger’s motion to dismiss should be granted.

V. CERTIFICATE OF APPEALABILITY

A prisoner must obtain a certificate of appealability from a district or circuit judge before appealing from the denial of a federal *habeas* petition. *See* 28 U.S.C. § 2253(c). A certificate of appealability is issued only if the applicant makes a substantial showing of the denial of a constitutional right. *See Roberts v. Burgerox*, 137 F.3d 1062, 1068 (8th Cir.

1998). The court finds Bowers has failed to make a substantial showing of the denial of a constitutional right, and recommends a certificate of appealability not be issued.

VI. CONCLUSION

For the reasons discussed above, **IT IS RECOMMENDED**, unless any party files objections⁵ to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that Burger's motion to dismiss be **granted**, and judgment be entered in favor of Burger and against Bowers.

IT IS SO ORDERED.

DATED this 30th day of May, 2003.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

⁵Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. See Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. See *Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).